

**LAW MODERATIONS – HILARY TERM 2019
MODERATORS' REPORT**

PART I

(A) STATISTICS

Numbers and percentages of those passing and failing

Numbers

	2019	2018	2017	2016	2015
Distinction	30	34	37	26	34
Pass	189	166	176	180	177
Pass in 1 or 2 subjects only	2	2	-	3	-
Fails	-	-	-	-	-
Total	221	202	213	209	211

Percentages

	2019	2018	2017	2016	2015
Distinction	13.57	16.83	17.37	12.44	16.11
Pass (without Distinction)	85.52	82.18	82.63	86.12	83.89
Pass in 1 or 2 subjects only	0.90	0.99	-	1.44	-
Fails	-	-	-	-	-

Number of vivas

Vivas are not held in this examination.

Number of scripts double or treble marked

Scripts in this examination are not automatically double marked. Following the agreed procedures, scripts were double marked during the first marking process to decide prize winners and when a fail mark had been awarded. Some further double marking was done in the first marking process to police borderlines and check awards of very high and very low grades. Once the marks were returned, the following classes of script were second marked:

- Where a candidate had an average below 60;
- Where a candidate was borderline in terms of getting a distinction;
- Where a script had a mark below 60, and is 4 or more marks below the candidate's average;
- Where a candidate had one mark at or above 60 or two marks at or above 58; and where his or her overall average mark is below 60.

Second marking scripts of a II.II standard which were 4 or more marks below the candidate's average did not impose a significant additional burden on the examiners. The second marking of papers where the overall average mark was below 60, and with one mark at or above 60 or two marks at or above 58 was not helpful and would propose removing it. It was also felt that second-marking all scripts below of candidates with an average below 60 was unnecessary, since the real work was done by

looking for unusually low scripts, and hence the “four below” rule should be extended to all scripts, not just those below an average of 60. That would give the following three rules:

- Where a candidate has two marks at or above 67 but does not already have two marks at or above 70, all scripts at 67, 68 or 69 will be remarked;
- Where a script is 4 or more marks below the candidate’s average across the three papers, that script will be remarked; and
- Where a course 2 candidate has an average below 60 all three scripts will be remarked.

Markers this year worked hard to follow the general instruction that the whole of the marking scale be used and grades at the higher end of the 60s and also above 70 be used liberally. This was particularly true of marks above 70. This resulted in a small group of candidates obtaining outstanding marks across all three subjects. The borderline grades of 58, 59, 68, and 69 were also used at the first marking stage, and each subject group engaged in double marking in order to test the lines between II.II, II.I and I class grades.

Beyond this, the Moderators have significant concerns about how rigorous the system of marking is. Many candidates’ scripts can receive only one marker’s attention as none of the second-marking rules apply. In particular, if that mark is not near a borderline for a Distinction (or under 60% on average, if a Course 2 student), and if it happens not to be four or more marks away from the average of the three scripts, it will not be reviewed. That is particularly likely if the “bunching” of marks, so easy to happen without the highest level of vigilance, tends to push marks towards the middle of a 2.1, reducing the chance for a particular script to be four marks below the average. In FHS, a minimum sample of scripts are automatically second-marked whatever the second-marking rules require, but even that is a relatively small sample.

The Moderations exams are also premised on being classed only as Distinction, Pass or Fail whereas the reality is that every mark will have to be disclosed for any legal job experience, let alone any job or further study. Each paper percentage does in fact matter. It is therefore difficult to justify why a candidate receiving marks of 70, 70 and 68 (or indeed 67 or 69) should not have a review of some kind of the third script, the script below 70. The same is true at the 60/59 borderline as well, even without a classed Moderations exam.

None of these concerns underplay the incredible work the markers, Moderators, and the Exams Officer put in in order to get the marking completed within the incredibly tight timetable that Moderations exams have. Adding greater marking burdens within that timeframe would not be advisable. For that reason, full double marking is not a viable option without significantly greater marking resources.

The Moderators consider that a change in marking practice could achieve greater robustness without adding significantly to the marking burden. One such practice would be what is sometimes described as “global review”. Each script is looked at by two markers, but the total number of scripts a marker looks at remains the same. The first marker marks the first two questions on the script, and then the scripts amongst the four markers are rotated, and the second marker marks the second two questions on the script. After the second two questions are marked, the second marker compares those marks with the marks for the first two questions, and reviews any discrepancy. If the marks cannot be accounted for easily, such as a stronger ability in problem questions leading to higher marks in two questions, or an incomplete fourth answer giving a lower mark, the two markers review that script together. This might elicit an earlier stage of second-marking, by a third person (potentially the Moderator, if the Moderator was not one of the earlier markers). Ultimately, the second-marking stage still applies, but might be expected to require less second-marking than now. Overall, this review would enable the Faculty to tell each candidate that each script was looked at by at least two different markers. The only added administrative burden is in arranging the rotation of scripts, which should be manageable. The only added marking burden is in any extra review where the second two marks do

not seem to be close enough to the first two marks. If that burden is small in practice, we should be reassured about the consistency of the marking and not troubled by a little extra time to check. If that burden is large, we would be unearthing and resolving flaws in the marking which would currently not be being seen or fixed. Systems like this have been used by other Universities who cannot employ double marking, and have not been found to be overly burdensome.

Number of candidates who completed each paper

221 candidates sat each of the three papers.

(B) EXAMINATION METHODS AND PROCEDURES

Incomplete answers and breaches of rubric

As last year, 'short weight' and associated phenomena were dealt with by the award of the mark merited by the work the candidate had actually presented. The only rubric breaches this year occurred where candidates had failed to complete the four questions required. In one case this resulted in an average mark of the completed questions, less the maximum penalty of 10 percentage points, while simply omitting a question meant there were zero marks awarded for that question.

Consistency of marking

Steps were taken to review the consistency of markers' profiles after 25 scripts, and also at the end of the first marking stage. The Moderators agreed that investigation and explanation should follow if either an individual marker or a team of markers awarded fewer than 15% or more than 20% I class marks, or fewer than 5% or more than 10% II.II (or worse) marks. The Moderators also recommend that each marking team, led by the setter and the Moderator, produce a briefing document for the others in the marking team, setting out the issues in each question, and what might distinguish better answers. The content of this document will naturally arise where a marking team agrees on the issues and points of distinction as it should, but having it set out in a document might help with consistency throughout the marking period. It might also ensure that any latent ambiguities in approach are brought to light. The document would not constitute notes in respect of any particular candidate, and would not be disclosed in a Freedom of Information Act or similar request. It might be of use to the wider teaching team for marking later Collections or past essays, if the marking team were open to sharing it.

(A) PRACTICE WITH REGARD TO SETTING PAPERS

Each paper was set by the relevant Moderator, acting in conjunction with the paper's other markers. Where the convenor of the subject group was not on the marking team, the convenor was also consulted.

Past papers were available via OXAMS.

PART II

(A) GENERAL OBSERVATIONS

The Moderators are extremely grateful to Gráinne de Bhulbh, the Law Faculty Examinations Officer. This is, sadly, the last time Gráinne will be working on Moderations exams, and we wish her the very best in her new post.

The tight timetable for Mods was maintained. All the markers showed exceptional zeal and promptness early in the marking period. All markers also cooperated effectively to ensure that second marking took place efficiently, accommodating conferences and childcare over the school holidays.

Medical certificates and special cases

29 candidates had special arrangements for sitting their examinations. There were 12 'Factors Affecting Performance' applications in total. No candidate's final result was affected.

Release of grades

The grades for all students were released without error, on Friday, 29 April 2019.

(B) GENDER etc. (equal opportunities issues and breakdown of the results by gender; Course 1 and 2 performances; ethnicity analysis)

The gender breakdown for Course 1 and Course 2 combined was:

Result	2019		2018		2017		2016	
	Gender	No	Gender	No	Gender	No	Gender	No
Distinction	F	18	F	17	F	16	F	7
	M	12	M	17	M	21	M	19
Pass	F	118	F	104	F	106	F	102
	M	71	M	62	M	70	M	78
Two Paper Pass	F	1	F	2			F	3
	M	1	M	0			M	0

These statistics indicate that the rate at which women obtained a Distinction remains slightly lower than the rate at which men obtained a Distinction, although the disparity is much smaller than it was in recent years.

It was also possible to disaggregate the comparative performance of Course 1 and Course 2 candidates – 12% (22/190 candidates) and 26% (8/31 candidates) achieved Distinctions in each group respectively, and 14% in the combined cohort.

The Moderators were not asked to produce an ethnicity analysis of the results and do not have the data to do so.

(C) SUBJECT REPORTS

A Roman Introduction to Private Law

General comments

This is the third year in which the new rubric introduced in 2017 has been in force, and it appears now to be well established. There were no breaches of the rubric, and candidates showed reasonable facility in answering problem questions (now compulsory). On the whole, candidates also showed good knowledge of the new areas of the syllabus introduced in 2017. Candidates are, however, reminded that problem questions require them to apply their legal knowledge to the facts. Therefore an answer which provides a general account of the law but fails to engage with the facts cannot be rewarded with a high mark; the same is true of a conclusion devoid of analysis, without any attempt to explain the basis of that conclusion. Furthermore, although there is no single formula for a good answer to a problem question in this subject, candidates are advised to organise their answers according to some guiding method, whether they tackle the problem in terms of chronological sequence, by parties, by issues, or in some other way.

Question 1

This is the only compulsory question on the exam, although candidates have an internal choice of two out of six texts. Overall, candidates furnished well-informed and appropriate comments on the texts set. Candidates are reminded, however, that they should avoid generic discussions of legal issues associated with the subject of the text; instead, they should attempt to identify one or more particular features of the text that merit comment. For example, text (d) was not an invitation to provide a general account of the contract of *stipulatio*, and text (f) was not an invitation to regurgitate notes on the criteria for liability for *iniuria*, but called rather for comment on the narrower issue of Gaius's account of *atrox iniuria*.

Though by no means exhaustive, the following list identifies features of the texts upon which stronger answers focussed:

- (a) Justinian's explanation for the shift away from the assemblies of the people (*comitia*).
- (b) How the incorporeality of praedial servitudes was reflected in doctrines relating to their creation – e.g. acquisition by use, the resort to *quasi-traditio* rather than *traditio* (which entails the transfer of possession) – and termination.
- (c) The idea of effective control as an aspect of possession, and the extent to which it was adaptable to different species of animals (e.g. the interaction with *animus revertendi*).
- (d) The significance of *veluti* and the relationship of *sponsio* to the other stipulatory verbs.
- (e) The terminology of “penalty” and the reference to “whether the thief be a slave or a free man” in relation to the XII Tables' penalties for manifest theft.
- (f) The differences between Gaius' and Justinian's treatment of this issue; the (rarely spotted) difference between Gaius's treatment of the magistrate (*iniurae* against whom are always *atrox*) and the senator (where there needs to be a disparity in the status of the wrongdoer and wronged).

Question 2

This question had three central elements: ownership of the mare (and associated contractual and delictual issues); ownership of the foal; and the ability of A to recoup the costs of breaking in the foal.

Regarding the first of these elements, strong answers considered the following issues: (1) Whether the mare had been abandoned (the events described in the second paragraph suggest that the answer must be 'no'); (2) whether the circumstances surrounding B's catching of the mare meant that it had been stolen by him (of relevance also to subsequent *usucapio*); (3) the efficacy of A and B's swap (Was it sale? *Permutatio*? What was the efficacy of the *traditio* (i) of a *res Mancipi*; and (ii) by a non-owner? Some outstanding candidates considered the question whether there was any warranty

against eviction inherent in the parties' contract, if any, and if so, by what action it might be enforced; (4) the efficacy of the *mancipatio* of the mare by A to D (given that A is a non-owner); and (5) possible *usucapio* of the mare (particularly the difficult question of A/D's possession in view of the putative usufruct – see further below).

Regarding the second element, here candidates needed to consider whether the usufruct over the mare had been validly created (no, due to the fact that A is not owner) and apply the rules on the acquisition of fruits (rather than *specificatio*). Strong candidates noticed that A appeared to be neither a usufructuary nor a *bona fide* possessor, given his belief that he was an usufructuary, and so had no entitlement to the foal.

The third issue, the recovery of the costs of breaking in the foal, was best analysed through A's ability to raise an *exceptio doli* (a defence, not an action) if the foal was vindicated from him. Generally speaking, candidates were too willing to assume that these damages were recoverable as consequential loss under the *lex Aquilia*.

Question 3

This question raised issues from across the syllabus.

The second paragraph touched on the sale of stolen property. Many candidates spent rather too long on how F might sue the furtive vendor (in light of the facts provided there was little room to doubt liability in *furtum*). Their time was better spent considering contractual remedies available to E in the event of eviction of any remaining snails by F. The creation of the ink was best seen as an instance of *specificatio* (as per G III.79) with the possible antecedent issue of ownership of snail fluids (fruits or component parts?).

The borrowing of the *Odes of Horace* was a *commodatum*. A number of issues stemmed from this: straightforwardly, there was the issue of breach (and *furtum usus*) through retention or copying. Rather more complex, and rarely dealt with, was the question of *vis maior* accompanying the destruction of the *Odes* by the barbarian horde, and how *vis maior* interacted with the pre-existing breach of the *commodatum*. The destruction also provided a basis for a claim under chapter three of the *lex Aquilia*. Candidates often had difficulty working out who ought to have that claim. As there was no *causa* to support any transfer of ownership from H to G, it is H, as owner, who can sue for its destruction (G is a *mala fide* possessor).

The creation of a copy of the *Odes* raised a classification question reminiscent of Gaius' goldsmith text (III.147). Stronger candidates considered how the *scriptura* of the copy affected the answer to that question (see Gaius II.77).

The ransacking of G's home raised a host of delictual possibilities. None was particularly controversial, and some candidates spent a disproportionate amount of time explaining in great detail how *furtum*, *rapina*, *damnum iniuria* and *iniuria* had all been made out (at the cost of deeper analysis of the more difficult issues identified above).

Question 4

This question raised a large number of overlapping issues, and candidates sometimes spent too long on the more straightforward wrongs at the start.

The first paragraph raised three possible *iniuriae*. Many candidates were far too quick to say that the truth renders the rumour-spreading non-contumelious. Better answers suggested that truth goes to the question of *contra bonos mores* (against good morals) or injurious intent, and so is only justificatory where there is a public interest in the truth-outing. The chalking of the door was more straightforward (which might also be covered by chapter three of the *lex Aquilia*, depending on whether the door is 'spoiled'), as was the trespass onto the farm (*iniuria*). The fact that J's family are also upset raises the possibility of multiple claims.

The correct analysis of the destruction of the sluice and consequent deaths of J's fish and sheep was more difficult than most candidates realised. Most wisely separated their analyses into three sections: the sluice, the fish and the sheep. The first two of these would be claims under or by reference to

chapter three (a disappointing number of candidates either did not realise that chapter one only applies to slaves and *pecudes*, or have disconcerting ideas about the anatomy of fish), with the 17 sheep falling under or by reference chapter one. Many candidates saw that directness differed as between the sluice and the animals, the former falling within the scope of the *lex*, the latter probably actionable only by means of a praetorian action. Far fewer candidates considered whether the *drowning* of the sheep and the *suffocation* of the fish were equally indirect.

The escaped sheep, upon being caught, raised a parallel to the peacock text on *furtum* (D 9.2.37), extensively addressed in lectures and in the prescribed secondary literature. The slaughter of the first sheep could be analysed under chapter one of the *lex Aquilia*. The sale of the second by J to N involved considering the validity of the *stipulatio* and, if it proved invalid, whether and if so on what basis there could be liability under the contract of sale. Only better students had a sure grasp of the interplay between the *stipulatio duplae* and buyer's remedies based on the *actio empti*. An easily avoidable mistake was the naming of 'double the value' rather than of 'double the price' as a possible measure of recovery.

The third sheep required discussion of *furtum* and acquisition via *occupatio* (it was not a *res nullius*) and/or *usucapio* (for which time had not passed, leaving aside the absence of a *iusta causa* and the question of whether or not the sheep was a *res furtiva*). The lamb and the wool required consideration of the rules on fruits (N a *bona fide possessor*?) and a possible case of *commixtio*.

Question 5

This essay was straightforward for students who had revised diligently. It required a consideration of the different types of imperial enactment – what is 'law' – and could be developed through discussion of indirect law-making (e.g. through *senatusconsulta* or the *ius respondendi*) – what does it mean to 'make law'? Weaker candidates offered generic responses on the sources of Roman law, with lengthy exegeses on the jurists and praetor that did little to develop their response to the question asked. Stronger candidates not only gave a clear historical perspective, but also offered textual examples of different imperial influences upon the Roman legal system.

Question 6

This question was very popular and on the whole competently handled, though with relatively few strong answers. The question demanded a focus on the *practical* significance of the distinction between ownership and possession, and far too many candidates tried to force prepared material on the concepts of ownership and possession into their essay. As to the *actio Publiciana* and associated protections, while this was clearly relevant to the question, many candidates did not explain, or possibly fully understand, the distinction between one in possession and one on the road to *usucapio* (whether or not still in possession). Relatively few candidates were able to give a competent account of the availability and operation of the possessory interdicts. Strong answers took many different approaches to the question. Some considered the practicalities of enforcement, others considered the content of *dominium* (i.e. the rights exercisable by a *dominus*) and the extent to which they were conferred on others, and others still considered the variability of the answer depending on context (e.g. in relation to provincial land or wild animals). A willingness to answer the question on its own terms rather than to shoehorn in a prepared answer was duly rewarded.

Question 7

Although less popular, this question provoked some excellent responses. Strong answers tended to suggest that although there was a lot of overlap, individual grounds for nullity found different forms of expression depending on their contractual context, and some contracts had unique grounds for nullity (or permutations of more common grounds for nullity). For instance, (in)capacity is a universal ground for nullity, but the requirement of the ability to speak and hear was a variation on this specific to the *stipulatio*. Several candidates noted that grounds such as *dolus* and *metus* had radically different effects on the *stricti iuris* and *bona fidei* contracts. The rules governing the effects of error were less well handled, and rules on impossibility and immorality were infrequently discussed. The best answers were able to discuss changes in the effect of grounds for nullity (particularly mistake) as between classical and post-classical law, and the relationship between these changes and shifts in the wider understanding of the source and nature of contracts in general.

Question 8

This question was moderately popular and relatively straightforward for prepared candidates. Most linked the question to the *formulae* used in actions on consensual contracts, and how the requirement of *bona fides* was used to shape implied terms within said contracts. Weaker candidates gave a generic account of the difference between these and *stricti iuris* contracts without focusing on how good faith “found expression” in the consensual contracts. Stronger candidates gave examples of that expression (e.g. protection against eviction and latent defects, rules on risk and standards of care, termination of a *societas*) and sought to explain how the formulaic concept translated into a sophisticated body of contract law.

Question 9

This question was very popular and was generally well answered. The structure of the response was provided by the quotation from Nicholas. Candidates were expected to deal with (1) causation/directness; (2) *iniuria*; (3) *damnum* to the plaintiff; (4) the possibility of plaintiffs other than a *dominus* (e.g. in the case of injury to a free person) and, generally, how these factors were shaped by juristic interpretation or praetorian extension. It required a clear sense of the chronology of the *lex Aquilia*, and the way in which individual strands of the delict were shaped by the different influencing factors. It was also difficult to answer this question without a clear idea of the original scope of chapter three (ably dealt with by many candidates through reference to the seminal articles by Daube and Jolowicz).

Question 10

This question had very few takers indeed. Candidates needed to explain the terminology of the question (“second life”, “reception”, “*ius commune*”) and the implications of codes for all of these.

Constitutional Law

Most of the scripts demonstrated a sound understanding of the material and the key debates. Several of the questions on the paper were broad in scope and invited candidates to select a number of issues for discussion (but with no single path being required to answer the question well). With some questions there was a tendency to write rehearsed essays on the relevant topic. The best candidates engaged with the question, using the detail to support arguments and showing a good awareness of the secondary literature. 34 candidates gained 1st class marks, 170 gained upper seconds, 14 gained lower seconds and 3 scripts were either a fail or awarded a third class mark.

Comments on each question:

1. A broad question about political accountability to Parliament and to the electorate. To answer the question well, candidates could choose from a range of issues to discuss. Most answers looked at the potential for the executive to dominate the legislature (and the scope for the legislature to push back). Many also noted the useful role played by Select Committees. Fewer looked at the extent to which MPs can be held accountable by the electorate and the limits of electoral accountability.
2. A question about the process of change for the UK constitution. Many candidates considered the evolutionary development of the constitution (often using conventions as an example). Some also discussed how this has allowed the constitution to develop pragmatically. A number also looked at the limit on implied repeal in relation to constitutional statutes. Some of the stronger scripts also looked at the role that referendums can and should play in the process of change.
3. The question raised the issue of the asymmetric devolution arrangements and whether the asymmetries had been addressed. Most candidates were familiar with the basic arrangement of devolution in the UK. A number of good scripts defended the asymmetries (challenging the view that it needed to be addressed). The question also invited candidates to discuss recent reforms, such as EVEL and the increased powers to the devolved legislature in Wales.
4. The question invited candidates to discuss whether constitutional law now enjoys superiority over other laws in the UK and the relationship of such superiority with the traditional hierarchy of sources of law. Most candidates discussed *Thoburn*, *HS2* and the role of constitutional statutes. There were a number of paths that could be taken to answer the question well. A number of candidates gave a

close analysis of the cases to argue that the traditional position remains largely intact. Stronger scripts also looked at the challenges in defining what counts as constitutional law.

5a. The question invited candidates to consider s.4 of the HRA and whether it shows respect for the legislature. Most candidates noted that s.4 leaves the last word to Parliament. A number discussed the role of s.4 in establishing a dialogue, and some also noted the limited nature of any dialogue in practice. The second part of the question was more focused and raised an issue that had divided the Supreme Court in *Nicklinson*. A number of candidates confused the exercise of the discretion not to make a s.4 declaration (where a violation of an ECHR right has been found) with a court finding that there has been no breach of a right (for example, where the court defers to the legislature).

5b. Some very good answers to this question. Many candidates made a comparison between the common law and the Human Rights Act 1998, for example in contrasting the principle of legality with the powers under s.3 and s.4. The role of the common law in decisions such as *Kennedy* and *Osborn* was also noted by many. A number of candidates also went on to consider a larger role for the common law, following dicta made in *Jackson* and *AXA*. A smaller number of candidates discussed how the HRA provides for internal protections within Parliament (such as the s.19 statements). The weaker scripts tended to focus on the HRA and said very little about the common law.

6. The question invited candidates to discuss the role of the courts in relation to constitutional conventions. Most candidates discussed the leading cases, including *Jonathan Cape*, *Evans* and *Miller*. Some candidates seemed confused about the specific decisions in those cases and the implications. Some essays were let down by failing to engage with the second part of the question, to consider whether there are problems in courts policing conventions. Some of the stronger scripts noted that the arguments can apply with different force depending on the particular convention. A number of candidates also noted the potential problems in relation to parliamentary privilege if courts were to take on a bigger role in policing certain conventions.

7. In answering the question on the prerogative powers, a number of candidates provided rehearsed answers on judicial control (and some missed political controls completely). Most candidates were familiar with the developments in judicial review. The better scripts were able to explain the leading cases with precision, and also point to the limits of judicial review. A number of scripts also noted the problems in identifying all the prerogative powers, and the challenge this poses to limited government.

8. Many candidates discussed the formal and substantive rule of law (and some got side-tracked into that debate). Most discussed the leading cases, such as *Entick*, *Purdy*, *Reilly*, and *Unison*. Many were (surprisingly) sanguine about the outcome in *Cornerhouse*. A number of the better scripts also looked at the potential conflict between the rule of law and other parts of the constitution (such as parliamentary sovereignty and parliamentary privilege).

9. This question concerned the separation of powers, in particular the judicial powers. The essay was generally well done. Most candidates attempting the question discussed the establishment of the Supreme Court, and the implications of decisions such as *Anderson*. Many good scripts also considered the difficulties in identifying what counts as a judicial function and referred to areas of potential overlap. Such overlaps were often defended as reflecting the partial separation of powers.

10a. The question asked about the impact of Brexit on parliamentary sovereignty. Most answers discussed the implications of *Factortame*, and whether Brexit will reverse that outcome. Again, there were a number of possible paths in answering the question. A number of candidates argued that with the precedent, sovereignty could not be restored and that there were already other non-EU limits on Parliament. Other candidates took a very different approach and argued that sovereignty had not been limited by membership of the EU (and so it did not need to be restored). A surprisingly small number of candidates showed any familiarity with the European Union (Withdrawal) Act 2018.

10b. A challenging question about the basis of legal sovereignty. Most candidates were quick to eliminate a statutory foundation for sovereignty and focused on the role of common law and political fact. In some cases, there was significant confusion about the differences between the various schools of thought (for example, with some claiming that Wade's account is based on the common law). To answer the question well, it is important to consider the various strengths and weaknesses of the leading accounts of sovereignty.

Criminal Law

The criminal law exam this year featured 8 essay questions, at least one of which was to be answered, and five problem questions, at least two of which were to be answered, leading to a total of four complete answers. No candidate attempted to breach the rubric, and the only scripts which failed to abide by it were the few which were incomplete. There was only a little evidence of rushed fourth questions, in some cases, significantly underperforming compared to the rest of the script. Most candidates seemed to have recognised the importance of timing spent on answers equally across their questions. Doing otherwise will almost always lose marks: even if a candidate does not think s/he knows much about the next question, the time spent thinking and writing about will usually achieve more than diminishing returns after 45 minutes on the first question. Whether as a matter of timing, or style, candidates should write in prose. The richness of answers is diminished by note-form answers and they thereby risk losing marks; similarly having an excessive number of sub-headings reduces the clarity of the answer (for example, there will rarely be a need to have more than ten sub-headings in three to four side of material). Both these points apply to problem questions and essays. Candidates were broadly able to show strength in both essays and problem questions, but there seemed to be a trend towards answering only one essay, and essay marks were often the lowest in a script. The same point was noted last year, and it is disappointing that no improvements have been made. Given the richness of the theoretical material in the criminal law, and the very wide choice of questions in the exam, candidates appear to have under-prioritised essay preparation in criminal law. Doing so will be unlikely to have advantaged them and it is not something that the Moderator recommends.

Q1: 'Those who argue that objective tests cannot find culpability are either mistaken or misguided'. Do you agree? How should the criminal law test for intention and recklessness?

The statement challenges a narrow subjectivist view of culpability, suggesting proponents are either misapplying the underlying principles ('mistaken') or have selected the wrong principles ('misguided'). The first trigger question, 'Do you agree' calls for an examination of the principles of the criminal law which support objective tests for culpability. Candidates could have considered all objective tests here, including the possibility in intention, recklessness, dishonesty (especially post *Ivey v Genting*) and even, briefly, what knowledge is compared to belief. The second trigger question is more specific, on the law of intention and recklessness. Candidates were expected to specify exactly what their test would be, and how it would work.

Q2: 'Calling [dishonesty] a question of fact is indeed misleading. It is a moral question. The big issue is whether we should be asking juries and magistrates to answer such moral questions – is it not the job of the law to do so and the job of the jury or magistrates to decide what the facts are and whether they fit the law? But I doubt very much whether this is a matter which the Supreme Court could solve...' (Baroness Hale, Bristol Alumni Association Lecture 2018, referring to *Ivey v Genting*). How well does the criminal law determine which questions are questions of law and which are questions of fact? How could it do so better?

This might have appeared to be a difficult question, and not many attempted it. It opens in the context of dishonesty, but widens the enquiry in the trigger question to consider all areas of law/fact comparison, such as gross negligence manslaughter and intention; answers covering material beyond dishonesty were expected. The quote itself gave a lot of good material to consider in itself, from the role of courts and the Supreme Court in particular, and the role of lay persons (the jury, in the roughly 5% of cases they are in, and lay magistrates where they appear in the other 95%) to the nature of what criminal legal rules do

Q3: 'The law relating to capacity to commit criminal offences has bright lines where it should have flexibility and flexibility where it should have bright lines.' Do you agree? How could the law on capacity as it relates to insanity, age and intoxication be improved?

This question required candidates to consider how to regulate the subjects of the criminal law, and in particular, whether capacity is something that requires discretion for facts of cases, or not. The first trigger question is general, but there are only a few further issues included in it which are not then the subject of the second trigger question, in particular, diminished responsibility and, perhaps, automatism (though arguably not, if it is conceived of as a voluntariness question, not a capacity question). In addition to the nature of bright lines/flexibility, the question requires a statement of the law as it is now, and how it could be improved. Candidates were indeed required to comment on each of the three areas, as the question asked.

Q4: When does the criminal law not recognise a duty to act? Should it recognise fewer duties to act?

This question on the area of omissions was, predictably popular. It elicited some good answers, and some very mediocre ones. Candidates were expected to be able to give the general position on the act/omission distinction, and the (at least) five exceptions, but go on to explain why those exceptions were valid without just accepting them as obvious, and to engage in whether there should be less (or possibly, more) liability for omissions.

Q5: 'The law on complicity demonstrates that criminal law focuses too much on results, and not enough on the fault of the parties involved.' Do you agree?

This question was about what role accomplices to criminal offences play in bringing about crimes compared to what fault they have. It necessarily involved some discussion of principalship, though that is not the focus on the question. Candidates had to discuss the role of outcomes (AR elements focused on results) and fault. It was not a particularly popular question, which is once again surprising given the wealth of material and the ease of making an interesting argument. Better answers engaged with the trial process and sentencing stage, as well as the substantive requirements for liability stage in complicity (and perhaps principalship as the comparison), covering *Jogee's* physical and fault components, Parasitic Accessorial Liability, innocent agency, and even withdrawal. Some good mileage was often made on what derivative liability is and its exceptions.

Q6: Why is consent important within the sexual offences and what should the test for it be?

This was a straightforward question about the role of consent, how it should be tested for, and some expression of what that test would be. It was a very popular question, with some solid answers. Sadly, many answers did not reach much further than saying that the absence of consent was part of what made the conduct criminal when students can be expected to engage with the wealth of academic literature on the topic, much of which was covered in lectures. Candidates were expected to be able to discuss the current law, or at least, know what it was in framing their proposals; this included not only ss. 74-76 of the Sexual Offences Act 2003, but the extensive case law as well. Answers which engaged with the issue of deception well were rewarded. Candidates would be well advised to notice that an absence of consent is a requirement for almost all the offences the Act (where those under the age of consent legally cannot consent, and so too is there almost always a requirement that the Defendant not have a reasonable belief in consent. The two elements are different, though refer of course to the same issue.

Q7: Should necessity and duress be available as defences to all criminal offences? What should the tests for them be?

This was a moderately popular question on the scope of two classic defences, each raising difficulties about the scope of the criminal law. There were some solid answers engaging with the justification/excuse dichotomy, the range of offences where the law has permitted the defences so far, and, amongst the better answers, a willingness to address the distinction, if any, between the two defences.

Q8: What offences should exist to protect persons from non-fatal and non-sexual harm?

This was a general question about the nature of regulation for matters under the Offences Against the Person Act 1861, and related common law offences like assault and battery. Candidates were expected to have a full range, including the offences on the syllabus, like poisoning. The Law Commission's latest proposals (from 2015) were typically used well by the moderate number of candidates who answered this question. There was some useful discussion of constructive liability, conduct as against result, and even the role of consent (an issue that is somewhat ambiguously dealt with as a matter of law now).

PART B

Q9: Ariadne, Bullus and Lucretia are bored one Saturday morning. Ariadne, who hates Minos, a local celebrity, suggests to Bullus that Bullus cut down Minos' topiary maze in his back garden that afternoon; Ariadne is not sure if Bullus will do it, but would like him to. Around lunchtime, Lucretia and Bullus agree that they will set fire to anything that will burn in Minos' front garden, so long as it is not raining. That night, Bullus and Lucretia buy the petrol to set fire to the garden, but as they unscrew the cap on the street outside Minos' house, it starts to rain and they decide to go home. They phone their annoying friend Daphne and threaten that unless she sets fire to the garden the next day, they will break her legs. Daphne sets fire to the garden the next day. What criminal offences, if any, have been committed?

This question started with an encouraging or assisting issue, before moving to touch on a possible conspiracy and, for good measure, an attempt possibility. It also required, amongst other things, consideration of the defence of duress, and the liability of B and L for whatever D does. It was generally answered well, with nicely considered comparisons of cases, and some valuable hay being made over why L and B did not want to start a fire in the rain.

Q10: Charlie and Denise have drunk quite a few beers on next to a river on Harbour Meadow and are feeling aggressive. Eubert walks past and sneers with distaste at the inebriation Charlie and Denise are demonstrating. Charlie and Denise notice the sneer and, insulted, want to cause him pain. Each of them throw a punch but Eubert ducks, causing Charlie and Denise to hit each other in the face. This enrages them further. Charlie grabs Eubert and Denise punches Eubert four times, then pushes him into the river, where Eubert drowns. What criminal offences, if any, have been committed? Would your answer be any different if Charlie was an alcoholic and Denise had been physically abused when she was younger by someone who looked similar to Eubert?

This question touched on questions of assault, battery and ss. 47 and 18/20 of the Offences Against the Person Act 1861, followed by homicide liability. There was a defence of self-defence to consider, as well as issues of intoxication and whether transferred malice (ever) adds anything. The alternative scenario could have raised questions of Loss of Self-Control, perhaps diminished responsibility, but not self-defence. A number of candidates raised the possibility of a conspiracy, but it is not clear what evidence would have suggested that offence.

Q11: Melissa and Neal are young rock climbers, exploring near the top of Mount Snowden in January when they come across Oliver. Oliver is unconscious under a bush, having been left there after his stag event. Melissa and Neal both think Oliver is very attractive, but are worried about how cold he looks, so they set up their tent and undress, pulling Oliver into their embrace for warmth. Melissa and Neal then decide to take advantage of the opportunity. Neal puts his penis in Oliver's mouth; Melissa puts Oliver's fingers into her vagina. Exhausted, Melissa and Neal fall asleep. While unconscious, Oliver knocks over an open bottle of water. When he wakes, he finds that the water has started to freeze on Neal's foot; he gets up, puts his clothes on and walks away. When Neal wakes up he has developed frostbite and has to have two toes amputated. What criminal offences, if any, have been committed?

This question covered a number of sexual offences, and concluded with an omissions issue, allowing sharp candidates to distinguish between *Miller's* two possible bases, in a "responsibility"/"duty" analysis and the "continuing act" assertion. The question did not say that M and N undressed O, and most candidates spotted that. Many candidates gave good reasons for seeing s. 4 of the Sexual Offences Act 2003 as the best choice for M's actions, rather than s. 3; s. 2 was not a viable charge

there given the wording of the statute, and for N's action, s. 2 being used instead of s. 1 would require very convincing explanation.

Q12: During the heavy snow fall of the storm dubbed the "Monster from Over Yonder", Erica enjoys running and sliding on her knees along the ice on the pavement in front of the houses on her street. Just after Erica has set off on a slide, Francine, an elderly neighbour steps out of her front door. Erica notices Francine and screams a warning instead of stopping. Francine, who is hard of hearing, does not hear the warning; Erica crashes into Francine and breaks Francine's leg. In the ambulance on the way to the hospital, Francine is given a common anaesthetic. It transpires that Francine is allergic to the anaesthetic and she goes into a coma and is put on life support. Gary, Francine's doctor, decides that the bed would be better used for someone younger, so rather than waiting for Francine to pass away on her own, he turns off the life support machine and Francine dies. What criminal offences, if any, have been committed?

This question started simply enough as an offence against the person issue, and candidates were rewarded for considering the act/omission distinction possibilities in E's actions. Causation was key to the question, involve careful analysis of what might break which chains of causation. Stronger answers engaged with factual breaks, and the role of the mental state of a person whose actions might break the chain of causation.

Q13: Trevor and Ulysses dislike Victor, and plan to take Victor's car to drive around the city of Cowweir that night for amusement. Trevor knows that Ulysses has a very strong desire to take the car, and contemplates that Ulysses might use force to do so but persuades Ulysses to take Trevor's knife, not the gun Ulysses would have taken. Unfortunately, when Trevor and Ulysses get to the car, they do not notice that Victor is in the car asleep. When they start trying to pick the lock, Victor wakes up and attacks them with a baseball bat, breaking Ulysses' finger and causing both to flee. Ulysses is enraged at not having had the gun he could have used, and takes it out on Trevor when they get home by stabbing Trevor in the arm with the knife. What offences, if any, have been committed?

This was a simple enough question, where candidates could discuss theft (or s. 12 of the Theft Act 1968 was acceptable is a candidate happened to know of it, it was not required), and what a conspiracy and an attempt for this would be. Candidates were expected to consider the harm done to U's fingers, and possible defences, with there not being significant evidence of a threat to V himself at the time of the use of the baseball bat. The final twist, the attack with the knife, also links to issues of complicity, though not many answers engaged with that issue.